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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,
Respondent,

VS.

OGNIAN BOZAROV,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WEYMAN I LUNDQUIST
(Counsel of Record)
HELLER, EHRMAN, WHITE & MCAULIFFE
333 Bush Street
San Francisco, California 94104-2878
Telephone: (415) 772-6000
Attorneys for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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QUESTIONS PRESENTED

I. Whether the separation of powers doctrine of the United States Constitution permits Congress to make a broad delegation of authority to the Executive which totally precludes judicial review of the delegated functions?

II. Whether under separation of powers analysis the purpose of an intelligible principle channeling Executive discretion is solely to allow Congress to monitor its delegation or whether it is also to "permit a court to ascertain whether the will of Congress has been obeyed?"

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

REFERENCE TO OFFICIAL REPORTS

The opinion of the Court of Appeals filed on August 10, 1992 is not yet published. A copy of that opinion is attached to this petition as Appendix A and will be cited herein as "op." The United States District Court for the Central District of California filed no opinion but entered judgment dismissing the indictment on August 29, 1991. A copy of that judgment is attached as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 10, 1992. Jurisdiction of this Court is invoked under the provisions of Section 1254(1) of Title 28, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979). All references are to the statute as written at the time of the indictment in 1983. The statute provides in pertinent part: 50 U.S.C. §§ 2410(a) and (b) provide criminal sanctions for violating the statute and its regulations as well as any licenses or orders issued thereunder; § 2412(a) excludes all "functions exercised under the Act" from judicial review. The functions the Secretary of Commerce is required to carry out are contained, for example, in §§ 2405(c), 2405(d), 2405(f) (requiring consultation with business and industry, other countries and Congress), 2404(c)(3) (goods and technology on the control list must be reviewed at least once a year to determine whether they should remain on the list; factors include the availability of similar technology from sources outside the U.S.), 2404(h) (consultation with technical advisory committees). United States Constitution: Articles I, II, and III.

STATEMENT OF THE CASE

Petitioner Ognian Bozarov, a citizen of Bulgaria, was indicted on November 3, 1983 for conspiracy to violate the Export Administration Act of 1979, 50 U.S.C. App. § 2410(a) ("the EAA"), involving the exportation of computer disk manufacturing equipment. The equipment in question had been obsolete since 1976 and available from sources outside the U. S. since 1979. Petitioner was never notified of the charge against him by the United States Attorney. Bozarov first learned of the indictment when, because of the pending criminal proceedings, he was denied export privileges by the Department of Commerce. Bozarov protested and requested a hearing. In 1986, without a hearing and without government opposition, a Commerce Department Ad-

ministrative Law Judge ordered his export privileges restored. Petitioner thus assumed that the export violations charged had been resolved in his favor. On two occasions, he was issued a visa to enter the United States. On the second of these visits, in December 1990, Bozarov was arrested on the outstanding conspiracy charge that had been pending since 1983.

Petitioner made several motions in the District Court, one of which is germane to this Petition. A motion to dismiss the indictment was made on the grounds that the Export Administration Act violated the separation of powers doctrine of the United States Constitution because the Act precluded all judicial review; and that the Act, as applied, denied due process. After briefing and several hearings, the motion was granted solely on the issue of separation of powers. Following this Court's decision in *United States v. Touby,* ____ U.S. ____, 111 S. Ct. 1752 (1991), the District Court held that the preclusion of all judicial review under the Act would permit the Secretary of Commerce ("the Secretary") to act contrary to the "intelligible principle" laid down by Congress, and that judicial review was required by the separation of powers doctrine to insure compliance with the legislative delegation. The District Court declined to reach the subsidiary question raised in the motion, that the statute as applied denied petitioner due process of law.

The government appealed under provisions of 18 U.S.C. § 3731. The Court of Appeals reversed the order dismissing the indictment, expressly holding that judicial review was not required under the separation of powers doctrine. The Court rejected the District Court's analysis of *Touby,* supra, that judicial review was required to "perfect" the delegation of legislative powers.

No petition for rehearing was filed.

REASONS FOR GRANTING THE WRIT

At the time of Bozarov's indictment, the Export Administration Act was the only significant legislation specifically excluding administrative or judicial review under the Administrative Procedures Act. It provided that all functions performed by the Secre-

tary were exempt from judicial review. Following this Court's holding in *United States v. Touby, supra,* the District Court dismissed the indictment on the grounds that the EAA violated the separation of powers doctrine by precluding all judicial review of executive action. The Court of Appeals reversed, holding that judicial review is not required of legislative delegations. Citing cases where *some* judicial review had been denied, the Court concluded that *all* review may be constitutionally limited. The Ninth Circuit's holding is clear: judicial review of legislative delegations is not required to permit courts to ascertain whether the will of Congress is being obeyed. This principle conflicts with decisions of this Court and other circuits on the permissible parameters of legislative delegations in limiting judicial review. The decision below permits the delegation of lawmaking power to the Executive, and bars the Judiciary from insuring that the delegation is being followed.

I

AN IMPORTANT CONSTITUTIONAL QUESTION INVOLVING "A QUESTION THAT THE SUPREME COURT APPARENTLY HAS NOT YET SQUARELY CONFRONTED" WILL HAVE BEEN DECIDED BY THE COURT BELOW IN A MANNER THAT VIOLATES THE SEPARATION OF POWERS NONDELEGATION DOCTRINE OF THE UNITED STATES CONSTITUTION.

The Court of Appeals erroneously decided a constitutional separation of powers question never before addressed by this Court:

> This appeal involves a question that the Supreme Court apparently has not yet squarely confronted: does a delegation of legislative power to the executive that is statutorily exempt from judicial review violate the non-delegation doctrine? In essence, this question turns on the purpose of requiring Congress to lay down an 'intelligible principle.' The government argues that the purpose of an intelligible principle is simply to channel the discretion of the executive and to permit Congress to determine whether its will is being

> obeyed. Bozarov contends that the purpose of requiring an intelligible principle is to permit a court to ascertain whether the will of Congress has been obeyed. We believe that the government has the better of the argument.

Op. at 9616.

If the Court of Appeals is correct in its observation that this extremely important and timely issue of constitutional interpretation has not been definitively resolved it is imperative that this Court do so now. If the Court does not confront the issue, the holding of the Court of Appeals below will permit a major erosion of the separation of powers doctrine which is fundamental to our way of government.

> [This] system of separated powers and checks and balances established in the Constitution was regarded by the Framers as [a] "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." We have not hesitated to invalidate provisions of law which violate this principle.

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., ____ U.S. ____, 111 S. Ct. 2298, 2310 (1991) (quoting *Morrison v. Olson*, 487 U.S. 654, 693 (1988)).

If this issue is not addressed by the Court the decision of the Court of Appeals will permit Congress not only to delegate its powers but also to be the sole authority determining whether its delegation had been or is being followed. This is constitutionally unacceptable. Such a result contravenes the 200 year history of separation of powers protections to our liberty. The framers of the Constitution recognized the fundamental flaw in such broad delegations in adopting a tripartite system. "The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 324 (J. Cooke ed. 1951) (Madison).

For reasons of practicality as well, Congress cannot serve as the sole authority monitoring its delegations. Senate conferees, for example, have described executive compliance with the statutory regulations of the EAA as "inconsistent and irrational" and noted that this noncompliance had denied "fair and equal treatment" to both exporters and foreign customers. H.R. Conf. Rep. No. 99-180, 99th Cong., 1st Sess. 57, *reprinted in* 1985 U.S. Code Cong. & Ad. News 108, 119. Despite such blatant disregard of the "intelligible principles", as specified by the EAA, it took four years for Congress even to comment on, much less act upon, the Secretary's failure to comply with his or her delegated duties.

The effect of the Court of Appeals decision on individuals can be devastating, as this case demonstrates. Under the EAA, the Secretary of Commerce is permitted to create a control list of exports requiring a license but no item is to be placed on the list until the Secretary undertakes a series of steps prescribed by the statute. The intended result of this Congressionally mandated process was to limit the goods that require an export license and generally to assure that the list included only current technology not available from other sources.

Because of the Court of Appeals' unwillingness to review whether the legislative delegation was adhered to, Bozarov is potentially denied the defense that because the congressionally mandated steps were not followed the items on the list were neither "current" (*i.e.*, that the Secretary had not performed the required annual review of list) nor "technology" (*i.e.*, whether the listed items were available from foreign sources) and thus never intended by Congress to be subject to an export license. Under the expansive language of *United States v. Mandel*, 914 F.2d 1215 (9th Cir. 1990), a defendant in a criminal case may not contest the Secretary's determination that a particular commodity is on the Commodity Control List. Right or wrong, if the Secretary says a commodity is on the list that determination is immune from judicial review *even if, in fact, the commodity is not on the list.*

Mandel followed *United States v. Spawr Optical Research, Inc,* 864 F.2d 1467, 1473 (9th Cir. 1988), which held:

> In this case, the Secretary has determined that the Spawrs' mirrors could not be exported without an export license. *Right or wrong, the trial court must accept this determination as a matter of law.* The government need not establish independently [of the Secretary's determination] at trial, as an element of the charged offenses beyond a reasonable doubt, that the Spawrs'mirrors were included on the CCL and therefore subject to the licensing requirement. Because the licensing issue was not an element of the charged offenses, the Spawrs are not denied due process or the right to a jury trial by deference to the Secretary's determination. [Emphasis supplied].

Judge Pregerson observed in dissent that treating the Secretary's determination that a commodity *is* on the list as conclusive raises serious due process and right to jury trial issues. *Id.* at 1475 (Pregerson, J., dissenting) (citing *In re Winship,* 397 U.S. 358 (1970) and *Sandstrom v. Montana,* 442 U.S. 510 (1979)).

The combined effect of the cases is inconsistent with other holdings of this Court, and certainly in conflict with the principles stated in *United States v. Touby.*

II

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH *U.S. v. TOUBY* WHICH STATES THAT JUDICIAL REVIEW IS REQUIRED TO PERFECT A DELEGATED LAW-MAKING SCHEME TO INSURE THAT "THE EXERCISE OF SUCH [DELEGATED] POWER REMAINS WITHIN STATUTORY BOUNDS."

Despite the Court of Appeals' finding that the issue here is undecided, this Court has faced the question of judicial review, in *Touby v. United States,* 111 S. Ct. 1752 (1991), and found it to be a necessary part of a valid delegation of legislative authority. This was the position of the District Court which found it implicit in the reasoning of the *Touby* majority that "judicial review

perfects a delegated law-making scheme by assuring that the exercise of such power remains within statutory bounds." *See,* Op. at 9612. This reasoning found express voice in the two-justice concurrence: "Because of the severe impact of criminal laws on individual liberty, I believe that an opportunity to challenge a delegated lawmaker's compliance with congressional directives is a constitutional necessity when administrative standards are enforced by criminal law." *Touby,* 111 S. Ct. at 1758 (Marshall, J., concurring).

The District Court held that while judicial review of some decisions of executive and administrative agencies may be precluded, (*See, Webster v. Doe,* 486 U.S. 592 (1988), a broad statutory ban on all judicial review would permit the delegatee to act with unfettered discretion, ignoring the "intelligible principle" laid down in Congress' delegation. Congress may not abdicate its constitutional duty to make laws, permitting the executive agency to make and enforce laws through the rule-making power, and render the judiciary powerless to determine whether the actions are within the scope of the delegation. The District Court also decided that if the need for judicial review was not implicit in *Touby*, this Court would have avoided the issue by holding that judicial review was not required to satisfy the separation of powers doctrine.

III

THE DECISION OF THE NINTH CIRCUIT CONFLICTS WITH THE SECOND AND FIFTH CIRCUITS

The decision of the Court of Appeals conflicts with decisions of other circuits. These other courts, in similar circumstances, have held that judicial review of a Congressional delegation of authority is constitutionally required. Judge Mansfield, relying upon this Court's decision in *American Power and Light Co. v. SEC,* 329 U.S. 90 (1946), observed that the combination of an "intelligible principle" and judicial review to insure compliance "assures that the delegatee will not act capriciously or arbitrarily," and that "[p]rivate rights are protected by access to the courts to test the application of the policy. . . ." *United States v. Pastor,* 557 F.2d

930, 941 (2d Cir. 1977). The Fifth Circuit relied upon *Pastor* in holding that judicial review of the detailed procedures would provide "adequate safeguards against arbitrary action." *United States v. Gordon,* 580 F.2d 827, 839 (5th Cir. 1978). Finally, in United States v. Widdowson, 916 F.2d 587,591 (10th Cir. 1990), *judgment vacated on other grounds in light of Touby,* 112 S. Ct. 39 (1992), the Tenth Circuit hypothesized that without judicial review of agency action, the delegatee [DEA] may act with unfettered discretion and place a substance as innocuous as aspirin on the controlled substances list and the decision could not be challenged. The decision of the Ninth Circuit Court of Appeals in this case permits just such actions by immunizing the Secretary's listing decisions under the EAA from judicial review.

The Court of Appeals misplaced its reliance upon cases upholding delegations that permitted preclusion of judicial review of some agency decisions. Only the Export Administration Act *totally* precludes judicial review even to the extent of denying courts the power to determine if the will of Congress is being met.

If the constitutional principle limiting delegations of legislative power is so vague as to give rise to such conflict in the lower federal courts, a clarification by this Court is necessary to resolve the conflict. Simply because, in limited instances, some delegated functions may be exempt from judicial review, as observed by the Court of Appeals, [Op. at 9616] it does not follow *a fortiori* that the totality of such functions may be immunized from judicial scrutiny and left solely to legislative control. The underpinnings of *Touby, Mistretta v. United States,* 488 U.S. 361 (1989), and *Skinner v. Mid-American Pipeline Co.,* 490 U.S. 212 (1989), are based upon fundamental principles necessary to preserve our tripartite system.

CONCLUSION

It cannot be that the legislature is the interpreter of the legality of its own actions for this would result in the self validation of whatever action the legislature chooses to take. Justice Marshall noted the fallacy of such unrestrained power almost two hundred years ago:

> The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained?

Marbury v. Madison, 5 U.S. 137, 176 (1803).

For all of the above reasons this petition for Writ of Certiorari should be granted.

Respectfully submitted,

By: WEYMAN I LUNDQUIST
(Counsel of Record)
HELLER, EHRMAN, WHITE &
MCAULIFFE
333 Bush Street
San Francisco, CA 94104-2878
(415) 772-6000
Attorneys for Petitioner

For Publication

United States Court of Appeals
for the Ninth Circuit

United States of America,
Plaintiff-Appellant,

vs.

Ognian Bozarov,
Defendant-Appellee.

No. 91-50646

D.C. No.
CR-83-0908-WDK-4

Opinion

Appeal from the United States District Court
For the Central District of California
William D. Keller, District Judge, Presiding

Argued and Submitted
July 6, 1992—Pasadena, California

Filed August 10, 1992
Before: Joseph T. Sneed and Dorothy W. Nelson, Circuit Judges, and Oliver W. Wanger, District Judge*

SUMMARY

Individual Rights/Constitutional Rights/Administrative Law/Judicial Review

Reversing and remanding a district court judgment, the court of appeals held that Export Administrative Act does not violate the nondelegation doctrine or appellant's due process rights.

*The Honorable Oliver W. Wanger, United States District Judge for the Eastern District of California, sitting by designation.

Ognian Bozarov was indicted for conspiring to violate the Export Administration Act (EAA) for his role in a scheme to transport computer disc manufacturing equipment in Bulgaria. The relevant commodities were listed on the Commodity Control List (CCL) subject to export control for national security reasons. Bozarov pled guilty to the charges and filed a motion to dismiss the indictment, arguing that the EAA's preclusion of judicial review violated the constitutionally mandated separation of powers and the due process clause of the fifth amendment. The district court dismissed the indictment and the government appealed.

[1] The court rejected the argument that Bozarov did not have standing to challenge the constitutionality of the EAA. [2] Similarly rejected was the government's contention that Bozarov was not entitled to bring a facial challenge to the EAA because doing so required him to raise the claims of third parties. [3] Turning to the merits of the appeal and noting that the Supreme Court has upheld a number of statutes precluding judicial review, the court acknowledged that the Supreme Court has not yet squarely confronted the question of whether a delegation of legislative power to the executive that is statutorily exempt from judicial review violates the nondelegation doctrine. [4] The court noted that the language of the APA also suggests that Congress intended certain agency actions to be immune from judicial review. The court thus concluded that both APA and the fact that the Supreme Court has upheld statutory schemes precluding judicial review suggest that preclusion of review may in some cases be constitutional. [5] The court was not persuaded by Bozarov's argument that the fact that the delegation at issue here eventually leads to criminal sanctions counseled in favor of his position. [6] Although the regulation calls the statutory penalties into play, the statute, not the regulation, creates the offense and imposes punishment for its violation. Consequently, the fact that the government's decisions under the EAA in a sense make it possible for criminal liability to be imposed does not mean that the EAA violates the nondelegation doctrine. [7] The fact that the EAA involves matters of foreign policy and national security also counseled in favor of upholding the Act's preclusion of judicial review. [8] The court's conclusion was bolstered by the

fact tha certain limited types of judicial review are available under the EAA despite the Act's seemingly absolute preclusion of review.

[9] Bozarov's argument that the preclusion of judicial review violated his right to due process was also meritless. The decision to control a commodity does not involve a defendant's individual rights and is not an element of the criminal offense in the pending case.

COUNSEL

Andrew G. McBride, United States Department of Justice, Washington, D.C., for the plaintiff-appellant.

Weymant I. Lundquist, Heller, Ehrman, White & McAuliffe, San Francisco, California, for the defendant-appellee.

OPINION

D.W. NELSON, Circuit Judge:

OVERVIEW

The United States appeals the dismissal of its indictment charging Ognian Bozarov with conspiracy to violate the Export Administration Act of 1979 (EAA or Act), 50 U.S.C. § 2401 et seq., for his role in a scheme to transport computer disc manufacturing equipment to Bulgaria. The district court dismissed the indictment based on its determination that the EAA was unconstitutional under the nondelegation doctrine because it delegated to the Secretary of Commerce legislative authority to control exports and prohibited judicial review of the Secretary's decisions. We reverse the decision of the district court because we believe that the Act's preclusion of judicial review does not violate the nondelegation doctrine. Because we interpret the Act to permit courts to review colorable constitutional challenges to the Act and claims that the Secretary has acted completely outside the scope of his delegated powers, we conclude that the EAA satisfies constitutional requirements.

FACTUAL AND PROCEDURAL BACKGROUND

The Export Administration Act

The EAA authorizes the executive branch to impose export controls for reasons of national security, foreign policy, or domestic short supply. 50 U.S.C. §§ 2402(2), (10) and 2404-06. Congress delegated substantial authority under the Act to the Secretary of Commerce. In particular, the EAA requires the Secretary to establish and maintain a Commodity Control List (CCL) and to issue validated licenses for the export of listed goods and technologies.

The Act contains an elaborate set of criteria and internal procedures which governs the Secretary's imposition of export controls. 50 U.S.C. § 2403. For example, the Secretary must make a determination as to the foreign availability of the goods and consider whether the goods are being restricted pursuant to a multilateral agreement. 50 U.S.C. § 2403(c), 2404(e). Additionally, controls imposed for reasons of national security must be compiled in coordination with other Departments and agencies and be coordinated with allies through international negotiations with the Coordinating Committee for Multilateral Export Controls (COCOM). 50 U.S.C. § 240-4(c)(3). The Secretary must periodically review the CCL to reassess the foreign availability of goods and the continuing need for national security controls. The Secretary must also furnish detailed reports with respect to each item monitored and submit annual reports to Congress concerning the administration of the EAA. 50 U.S.C. §§ 2406(b), 2413.

The EAA also contains detailed procedures for the processing of applications for validated export licenses for goods listed on the CCL. 50 U.S.C. § 2409. For example, the EAA prescribes time limits for decision, provides procedures for a right of appeal of a denial to the Secretary, and permits an applicant to respond to a denial in writing before a final determination is made. If the Secretary fails to act on an application in a timely fashion, an applicant may seek equitable relief in federal district court. The Secretary's denial of a validated license "shall be final and is not subject to judicial review." 50 U.S.C. § 2412(e). Indeed, all functions exercised under the Act are explicitly excluded from

judicial review and from the protections of the Administrative Procedure Act (APA). 50 U.S.C. § 2412(a). A willful violation of the Act or any regulation, order or license issued thereunder is a felony punishable by fine and/or imprisonment for not more than ten years. 50 U.S.C. § 2410(b).

Bozarov's Alleged Violation of the EAA

Ognian Bozarov is an international trade official who resides in Sofia, Bulgaria. In 1981, while serving as the deputy general manager of a trade organization devoted to developing industry in Bulgaria, Bozarov entered into negotiations with a Dutch company for the purchase of computer disc manufacturing equipment. The Dutch company then contracted with an American company to supply the equipment. Although the American company appears to have submitted an application for an export license, Bozarov alleges that he was eventually told by his American and Dutch partners that the equipment did not require a license. The relevant commodities, however, were indeed listed on the CCL for national security reasons. After the goods were shipped in late 1982 and early 1983, a ten count indictment was issued against Bozarov and four others on November 3, 1983.

Despite the issuance of a warrant for the arrest of all the defendants, Bozarov was apparently never notified of the charges against him by the United States Attorney. He learned of the indictment only when the International Trade Association issued a temporary order denying all export privileges to Bozarov and his co-defendants. Bozarov protested the order on the grounds that he had not been a party to any conspiracy and had acted in good faith. In 1986, Bozarov's export privileges were restored by an administrative law judge in the Commerce Department. Apparently under the impression that the charges against him had been resolved in his favor by this decision, Bozarov applied for and was granted a visa to travel to the United States to accept an international trade award. This 1990 trip to Puerto Rico was completed without incident. In December 1990, Bozarov was selected to host a trade delegation in San Francisco and again obtained a travel visa from the United States embassy in Bulgaria. Bozarov was arrested when he arrived in San Francisco.

On January 4, 1991, Bozarov entered a plea of not guilty. On May 20, Bozarov filed a motion to dismiss the indictment, arguing that the EAA's preclusion of judicial review violated the constitutionally mandated separation of powers and the due process clause of the Fifth Amendment. After briefing and hearings, the district court rendered its decision in a telephone conference call on June 11. The district court concluded that because the EAA precluded judicial review, the Act was an unconstitutional delegation of legislative power to the Executive. The judge based his decision in part on the Supreme Court's recent decision in *Touby v. United States,* 111 S.Ct. 1752 (1991), finding implicit in the majority's reasoning the principle that "judicial review perfects a delegated law-making scheme by assuring that the exercise of such power remains within statutory bounds." The district court also rejected the government's argument that preclusion of judicial review under the EAA was constitutional, even if review was otherwise required under the nondelegation doctrine, because the Secretary's decisions under the Act constituted nonjusticiable policital questions. The court reasoned that application of the political question doctrine presupposes the constitutionality of the underlying statute. Because he found the Act unconstitutional under the nondelegation doctrine, the district judge did not consider Bozarov's due process argument. The district court then dismissed the indictment. This appeal followed.

STANDARD OF REVIEW

All the questions presented on this appeal are pure questions of law subject to de novo review. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied,* 469 U.S. 824 (1984).

DISCUSSION

I. Bozarov's standing to challenge the constitutionality of the EAA

[1] As a preliminary matter, the government argues that Bozarov's failure to pursue administrative avenues for relief means that he cannot now challenge the statute's preclusion of

judicial review. We disagree. First, Bozarov did not realize that he was an "exporter" who needed to seek a license, and because he did not seek a license he had no adverse decision to appeal through the EAA's review procedures. Second, raising a constitutional challenge before the agency would have been a futile exercise because an agency has no authority to declare its governing statute unconstitutional. The Supreme Court has recognized that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." *Califano v. Sanders,* 430 U.S. 99, 109 (1977). We have thus ruled on constitutional challenges to statutes even when the challenge was not raised in an earlier administrative proceeding. *See, e.g., Reid v. Engen,* 765 F.2d 1457, 1461 (9th Cir. 1985).[1]

[2] The government also contends that Bozarov is not entitled to bring a facial challenge to the EAA because doing so requires him to raise the claims of third parties. We reject this argument. A defendant in a criminal proceeding is entitled to "insist that his conduct be judged in accordance with a rule that is constitutionally valid." Monaghan, *Overbreadth,* 1981 Sup. Ct. Rev. 1, 8; *accord* P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 166 (3rd ed. 1988). Thus in *INS v. Chadha,* 462 U.S. 919, 935-36 (1983), the Court permitted Chadha to raise separation-of-powers claims even though they reflected the interests of the executive branch,

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[1] The government's reliance on *Falbo v. United States,* 320 U.S. 549 (1944), is misplaced. There, the Court refused to hear Falbo's constitutional challenge to his military classification not because he had failed to exhaust his administrative remedies, but because he had not yet been injured by the agency's action because he had not yet been inducted into the military. In contrast, Bozarov has already been indicted, and thus has been directly injured by the statute that he claims is unconstitutional. *Yakus v. United States,* 321 U.S. 414 (1944), is also distinguishable because judicial review of the petitioner's constitutional challenge was available; Congress had simply specified a different court in which the petitioner should have brought that challenge. If we cannot entertain Bozarov's constitutional argument, that argument will go unheard by any court.

rather than Chadha's own private interests. The Court required only that Chadha demonstrate "injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Id.* at 936 (citation omitted). Bozarov has unquestionably been injured, *see* Hart & Wechsler, *supra*, and invalidation of the EAA will prevent him from being convicted. He therefore has standing to challenge the EAA as a whole, rather than merely as it is applied to him.[2] In sum, we conclude that Bozarov's constitutional challenges are properly before this court. We now proceed to the merits of Bozarov's challenge to the constitutionality of the EAA.

II. Does the EAA violate the nondelegation doctrine because it precludes judicial review?

The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of government. "The Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,' U.S. Const., Art. I, § 1, and we have long insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) (citing *Field v. Clark*, 143 U.S. 649, 692 (1892)). The Court has also emphasized, however, that the nondelegation doctrine does not prevent Congress from obtaining the assistance of its coordinate branches through delegations of substantial enforcement and policymaking authority. "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.' " *Mistretta*, 488 U.S. at 372 (citing *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S.

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[2] The government cites a number of cases holding that the defendant could not prevail on a facial challenge outside the First Amendment context without showing that the statute was unconstitutional as applied to him. *See, e.g., United States v. Salerno*, 481 U.S. 739, 745 (1987). Those cases have no application in this context, since Bozarov does claim that the statute is unconstitutional as applied to him.

394, 409 (1928)). Congress may therefore delegate under broad general directives so long as it "clearly delineates [the] general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *American Power & Light Co. v. SEC,* 329 U.S. 90, 105 (1946).[3]

[3] This appeal involves a question that the Supreme Court apparently has not yet squarely confronted; does a delegation of legislative power to the executive that is statutorily exempt from judicial review violate the nondelegation doctrine? In essence, this question turns on the purpose of requiring Congress to lay down an "intelligible principle." The government argues that the purpose of an intelligible principle is simply to channel the discretion of the executive and to permit Congress to determine whether its will is being obeyed. Bozarov contends that the purpose of requiring an intelligible principle is to permit a court to ascertain whether the will of Congress has been obeyed. We believe that the government has the better of the argument.[4]

The Supreme Court has upheld a number of statutes that precluded judicial review. In *Briscoe v. Bell,* 432 U.S. 404 (1977), for example, the Court held that preclusion of judicial review of the Attorney General's decision that a state was subject to the Voting Rights Act was constitutionally permissible. *See also Morris v. Gresette,* 432 U.S. 491 (1977). In both *Webster v. Doe,* 486 U.S. 592 (1988), and *Heckler v. Chaney,* 470 U.S. 821

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[3] The Supreme Court has invalidated statutes on nondelegation grounds only twice in the Court's history. *A.L.A. Schechter Poultry Co. v. United States,* 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935). Although the nondelegation doctrine appears to have "fallen into . . . desuetude" since these two decisions, at least one member of the Court appears to be calling for a reinvigoration of the doctrine. *Industrial Union Dep't v. American Petroleum Inst.,* 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring) ("We ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority").

[4] A Massachusetts district court has also rejected a nondelegation challenge to the constitutionality of the EAA. *United States v. Moller-Hutcher,* 560 F.Supp. 550 (D.Mass. 1983).

(1985), the Court declined to hear most of the complainants' challenges because it concluded that the relevant statutes precluded judicial review; the Court did not suggest that this preclusion was constitutionally objectionable. A number of other cases have concluded that statutes immunized agency actions from judicial review. *See, e.g., United States v. Erika,* 456 U.S. 201 (1982); *Southern Ry. Co. v Seaboard Allied Milling Corp.,* 442 U.S. 444 (1979); *Schilling v. Rogers,* 363 U.S. 666 (1960).

[4] Furthermore, the language of the APA itself also suggests that Congress intended that certain agency actions be immune from judicial review. The APA expressly states that the judicial review provisions of the APA apply except to the extent that statutes preclude judicial review. 5 U.S.C. § 701(a)(1). Both this language and the fact that the Supreme Court has upheld statutory schemes that preclude judicial review suggest that preclusion of review may in some cases be constitutional.

Bozarov argues that these cases are not dispositive of the question here. Perhaps most important, the bulk of these cases did not involve direct challenges to the statutes' preclusion of judicial review. The Court therefore did not analyze the requirements of the nondelegation doctrine in most of these cases. However, the fact that the Court and Congress both accept that judicial review may be unavailable at least suggests that the availability of review is not always a constitutional necessity. Moreover, although the case did not involve a nondelegation challenge, the Court expressly concluded in *Briscoe,* 432 U.S. at 414, that the statute's preclusion of judicial review was constitutional.

Bozarov also argues that the vast majority of these cases involved enforcement actions—such as the FDA deciding whether to initiate an investigation of a drug in *Heckler*—and not the kind of legislative decisionmaking arguable at issue in this case. However, Bozarov cites no authority for drawing a distinction between the exercise of executive authority and legislative authority when evaluating the need for judicial review, and we conclude that this argument is not very compelling. In both contexts, the central concern is that the agency exercise power only within the scope of its authority and within the confines of

constitutional norms. Moreover, the primary concern of the nondelegation doctrine is not that the executive exercise no lawmaking authority, indeed, the Court has recognized that Congress must obtain the assistance of its fellow branches so that the government may function properly. *Mistretta*, 488 U.S. at 372. The nondelegation doctrine is satisfied if Congress exercises the "*essentials* of the legislative function" by articulating an intelligible principle to guide the interstitial decisionmaking of the executive. *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 145 (1941) (emphasis added).

Bozarov contends that judicial review is also required to satisfy the nondelegation doctrine and points to a number of cases in which the Court held that no unconstitutional delegation of legislative authority had occurred because Congress provided the "administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress has been obeyed'." *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (citations omitted); *see also American Power & Light*, 329 U.S. at 105; *Yakus v. United States*, 321 U.S. 414, 426 (1944). We do not believe that these cases support the broad proposition that Bozarov urges upon us. While these cases clearly suggest that the availability of judicial review is a factor weighing in favor of upholding a statute against a nondelegation challenge, we do not believe that they can be read for the proposition that judicial review is always constitutionally required. Perhaps most important, the statutes at issue in *Skinner, Yakus*, and *American Power* did not explicitly preclude judicial review. Thus, none of these cases had occasion to address the issue of whether judicial review is always required, and none of the cases explicitly concluded that judicial review is mandatory.

We also do not agree with Bozarov that the Supreme Court's decision last term in *Touby*, 111 S.Ct. 1752, made the requirement of judicial review explicit. The petitioners in that case argued that a provision of the Controlled Substances Act, which permits the Attorney General to schedule dangerous new drugs on its list of controlled substances on a temporary basis, was unconstitutional because it barred judicial review of that decision. The Court rejected the challenge because it concluded that judicial

review was indeed possible under limited circumstances. In a concurring opinion, however, Justice Marshall, joined by Justice Blackmun, concluded "that an opportunity to challenge a delegated lawmaker's compliance with congressional directives is a constitutional necessity when administrative sanctions are enforced by criminal law." *Touby*, 111 S.Ct. at 1758. Justice Marshall emphasized that "judicial review perfects a delegated lawmaking scheme by assuring that the exercise of such power remains within statutory bounds." *Id.* Both Bozarov and the district judge concluded that the basis for Justice Marshall's concurrence — that judicial review is a constitutional necessity — was "implicit in the majority's reasoning" as well.[5]

We believe that Bozarov and the district judge are mistaken in the importance they attach to Justice Marshall's opinion. First, the opinion was simply a concurrence; the majority is under no obligation to address or correct errors in either a concurring or dissenting opinion. Second, it seems unlikely that the majority examined the statute to see if review was available because it believed that review was required, it probably considered the statutory issue in order to avoid having to decide the constitutional question of the necessity of judicial review. *See, e.g., Burns v. United States*. 111 S.Ct. 2182, 2187 (1991) (courts will avoid reaching constitutional questions if a permissible statutory interpretation is available).

[5] We are also not persuaded by Bozarov's argument that the fact that the delegation at issue here eventually leads to criminal sanctions counsels in favor of his position. It is true that broad delegations might be more suspect in cases involving criminal sanctions. *See, e.g., United States v. Robel,* 389 U.S. 258, 275

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[5]Bozarov argues that if the majority did not agree with Marshall, it would have simply decided the case on the ground that judicial review is not required. He believes that the majority would not have examined the statute to see if judicial review was available if it did not believe that review was required. He also suggests that it is "inconceivable" that the majority would not have addressed Marshall's assertion in the majority opinion if it disagreed with his assertion that judicial review was a constitutional necessity.

(1967) (Brennan, J., concurring) ("The area of permissible indefiniteness [of delegation] narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights . . . [T]he numerous deficiencies connected with vague legislative directives . . . are far more serious when liberty and the exercise of fundamental rights are at stake.") (citations omitted); *Fahey v. Mallonee,* 332 U.S. 245, 250 (1947) ("discretion to make regulations to guide supervisory action in such matters [appointment of conservators] may be constitutionally permissible while it might not be allowable to authorize creation of new crimes in uncharted fields."). According to Bozarov, the Secretary essentially has discretion to criminalize any conduct he chooses, and it is thus possible that the Executive could create purely political crimes entirely free from judicial review.

[6] However, "[i]t is well-established that Congress may constitutionally provide a criminal sanction for the violation of regulations which it has empowered the President or an agency to promulgate." *United States v. Gurrola-Garcia,* 547 F.2d 1075, 1079 (9th Cir. 1976). Moreover, the Secretary of Commerce is not creating a crime when he exercises his authority under the EAA; Congress created the crime when it prohibited the export of goods without a valid license and set the penalties for that crime. All the Secretary does is decide which penals require a license. Therefore, "[a]lthough 'the regulation calls the statutory penalties into play, the statute, not the regulation, creates the offense and imposes punishment for its violation.' " *Id.* at 1077; *see also United States v. Mandel,* 914 F.2d 1215, 1221 (9th Cir. 1990) (the decision to list a commodity on the CCL is not an element of the criminal offense). In a challenge brought to a similar statute, this circuit emphasized that the fact that the delegated authority might enable the executive to promulgate regulations whose violation leads to criminal liability did not alter its conclusion that the statute did not unconstitutionally delegate legislative power to the executive. *Gurrola-Garcia,* 547 F.2d at 1078 (nondelegation challenge to Mutual Security Act of 1954); *see also Samora v. United States,* 406 F.2d 1095 (5th Cir. 1969) (same). We therefore conclude that the fact that the Secretary's decisions under the EAA in a sense make it possible for criminal

liability to be imposed does not mean that the EAA violates the nondelegation doctrine.

[7] The fact that the EAA involves matters of foreign policy and national security also counsels in favor of upholding the Act's preclusion of judicial review. *Mandel,* 914 F.2d at 1222 ("administrative decisions under the EAA implicate national security concerns and foreign policy considerations"). In upholding a broad delegation under the Mutual Security Act, the Ninth Circuit emphasized "the President's traditional dominance in and responsibility for foreign affairs." *Gurrola-Garcia,* 547 F.2d at 1078. "[B]ecause of the changeable and explosive nature of contemporary international relations, ... Congress — in giving the Executive authority over matters of foreign affairs — must of necessity paint with a brush broader than that it customarily wields in domestic areas." *Zemel v. Rusk,* 381 U.S. 1, 17 (1965). In *C. & S. Air Lines v. Waterman Corp.,* 333 U.S. 103, 111 (1948), the Supreme Court emphasized that foreign policy decisions are "wholly confided by our Constitution to the political departments of the Government, Executive and Legislative." Permitting Congress broadly to delegate decisions about controlled exports to an agency makes sense; it would be impossible for Congress to revise the CCL quickly enough to respond to the fast-paced developments in the foreign policy arena. Moreover, the need for uniformity in the realm of foreign policy is particularly acute; it would be politically disastrous if the Second Circuit permitted the export of computer equipment and the Ninth Circuit concluded that such exports were not authorized by the EAA. Because the Supreme Court has consistently emphasized that broad delegations are appropriate in the foreign policy arena because of the political nature of the decisions and the compelling need for uniformity, the case for mandatory judicial review is even less compelling.

[8] In sum, we believe that the Supreme Court cases upholding judicial preclusion of agency decisions, the language of the APA, and the fact that the EAA involves foreign policy issues support our conclusion that the EAA's preclusion of judicial

review is constitutional.[6] We note in closing that our conclusion is bolstered by the fact that certain limited types of judicial review are available under the EAA despite the Act's seemingly absolute preclusion of review. First, colorable constitutional claims may be reviewed by the courts even when a statute otherwise precludes judicial review. *Webster*, 486 U.S. at 602-05.[7] Therefore, if the Secretary began to deny licenses for impermissible reasons (such as denying all license applications submitted by a minority group), that claim would be reviewable in the courts. Second, we believe that claims that the Secretary acted in excess of his delegated authority under the EAA are also reviewable. The District of Columbia Circuit has also adopted this position in the context of the EAA. *See Dart v. United States*, 848 F.2d 217 (D.C. Cir. 1988) (Assistant Secretary had no authority to reverse an ALJ's judgment in favor of an exporter, because the EAA only permitted the Secretary to affirm, modify or vacate decision of an ALJ); *see also Leedom v. Kyne*, 358 U.S. 184 (1958) (court may review whether agency acted in excess of its delegated powers).[8] Therefore, if the Secretary began controlling exports for reasons

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[6]We emphasize that our holding today is limited to the EAA's preclusion of judicial review; we express no opinion on the constitutionality of other statutes that prohibit all review.

[7]For example, the government has concluded that the courts may review Bozarov's nondelegation challenge to the EAA because it presents a colorable constitutional claim.

[8]The government suggested at oral argument that the Court's recent decision in *Board of Governors v. MCorp Financial*, 112 S.Ct. 459 (1991), means that claims that an agency acted outside the scope of delegated authority are not reviewable if the statute precludes judicial review. We do not believe that *MCorp* precludes judicial review of this type of claim under the EAA. The Court emphasized that preclusion of review was acceptable in part because the petitioner had a meaningful and adequate opportunity for judicial review of the regulation that he argued was promulgated in excess of the agency's statutory authority. The EAA presents an entirely different situation; petitioners have no other opportunity to challenge regulations or their applications. We therefore believe that *Dart* still sets out the correct standard to be applied to the EAA.

other than national security, foreign policy or domestic short supply, a claim challenging that action would be reviewable as well. Because these two types of review are available, we believe that the EAA's preclusion of judicial review does not violate the nondelegation doctrine.[9]

III. Does the preclusion of judicial review violate Bozarov's right to due process?

As an initial matter, the parties dispute whether the due process issue is properly before this court. Although Bozarov challenged the indictment on due process grounds and the parties briefed this issue below, the district judge did not render an opinion on this issue and Bozarov chose not to brief it thoroughly before this court. We conclude that we may consider this claim now; the due process issue is inextricably bound up with the separation of powers issue and deciding the entire case now furthers our policy against piecemeal litigation through interlocutory appeals. *See TransWorld Airlines, Inc. v. American Coupon Exchange, Inc.*, 913 F.2d 676, 680-81 (9th Cir. 1990) (court identified these concerns when deciding to what extent to exercise its jurisdiction.

[9] Identifying Bozarov's due process challenge is somewhat difficult. He appears to argue at one point that the regulation violates the due process clause because it does not give fair notice of the forbidden conduct. This argument is meritless, the CCL is published in the Code of Federal Regulations at 15 C.F.R. § 399.1 *Cf. Adamo Wrecking Co. v. United States,* 434 U.S. 275, 283, n.2 (1978) (nothing that only notice of prohibited conduct provided by the Clean Air Act was publication of proposed emission standards in the Federal Register).

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[9]The government also argues that even if the nondelegation doctrine requires judicial review, that principle is not applicable in this case because the Secretary's decisions under the Act represent nonjustifiable political questions. Because we conclude that the Act does not violate the nondelegation doctrine, we need not reach the question of the impact of the political question doctrine on this case.

Bozarov apparently also argues that the classification of this equipment on the CCL had no basis in fact and that the preclusion of review of this classification violates his due process rights. However, two Ninth Circuit cases have settled the question whether the denial of judicial review of the classification violates due process. In *United States v. Spawr Optical Research, Inc.* 864 F.2d 1467, 1473 (9th Cir. 1988), *cert. denied,* 493 U.S. 809 (1989), the court concluded that because "the licensing issue is not an element of the charged offenses," the petitioner's due process rights were not violated by the trial court's acceptance of the Secretary is licensing determination in the prosecution of the defendants. In *Mandel,* the court distinguished *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987) and *Estep v. United States,* 327 U.S 114 (1946), in which the Supreme Court held that " 'where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding.' " *Mandel*, 914 F.2d at 1221 (citation omitted). The court concluded that this principle was not applicable to a prosecution brought under the EAA, because the decision to control a commodity "does not involve the defendant's individual rights and is not an element of the criminal offense in the pending case." *Id. Spawr II* and *Mandel* are dispositive of Bozarov's due process challenge and we reject his contention.

CONCLUSION

We conclude that the Export Administration Act does not violate the nondelegation doctrine or Bozarov's due process rights. The district court's decision is reversed.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Honorable William D. Keller, Judge Presiding

UNITED STATES OF AMERICA,
Plaintiff.
vs.
OGNIAN BOZAROV, et al.,
Defendants.

NO. CR 83-908-WDK

REPORTER'S TRANSCRIPT OF TELEPHONIC PROCEEDINGS

Los Angeles, California

Tuesday, June 11, 1991

LORAINE M. DALEY, CSR, RPR
Official Court Reporter
453 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 620-9001

APPEARANCES: (Via Telephone)

In behalf of the Plaintiff:

LOURDES G. BAIRD
United States Attorney
ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division
NICOLA T. HANNA
Assistant United States Attorney
1300 United States Courthouse
312 North Spring Street
Los Angeles, California 90012

In behalf of Defendants:

HELLER, EHRMAN, WHITE & McAULIFFE
BY: WEYMAN I. LUNDQUIST
333 Bush Street
San Francisco, California 94104

LOS ANGELES, CALIFORNIA; TUESDAY,
JUNE 11, 1991; 4:30 P.M.

(Telephonic Conference.)

THE COURT: This is Judge Keller. Can I have your appearances, please?

MR. HANNA: Yes, Nick Hanna for the United States, your Honor.

MR. LUNDQUIST: Weyman Lundquist for the defendant, your Honor.

THE COURT: Good afternoon. I am sorry for the delay, but various and sundry reasons, including the complexity of this analysis, have delayed me. I am going to give you a ruling with some analysis, and then we can address what needs to be.

The first issue I am going to address is the separation of powers issue. As I perceive or understand the defendant's motion, as it relates to this particular subject, the defendant moves to dismiss the indictment because it violates Article I, Section 1 of the Constitution on its face and as applied to the defendant. In particular, you referenced that portion of the Constitution, which reads in part:

> "All legislative powers herein granted shall be vested in a Congress."

Again, I think your argument continues as the defendant with the contention that the Export Administration Act, which I am going to call the EAA hereafter because it is a bit shorter, is an unconstitutional delegation of the legislative authority to, as you denominated, "create crimes" to the Executive branch in violation of the separation of powers doctrine because the EAA does not provide for judicial review — in fact, the EAA explicitly prohibits judicial review.

In response to your framing, if you will, of the separation of powers issue, the government addresses the problem by leapfrogging, in a sense, to the issue of political question. They characterize the issue as the defendant is asking for judicial review of a political question.

I think that they are putting the analytical cart in front of the horse when they do this, and I think that was the thrust of your argument. Mr. Lundquist, when last we visited here in the courtroom on Friday, I believe it was.

MR. LUNDQUIST: Yes, your Honor.

THE COURT: It is my analysis, which I think I gravitated toward in the hearing of last Friday, that it is inappropriate for the Court to reach the political question issue at the juncture that is urged by the government. The fact that the Executive branch's administration of the EAA may in some instances involve national security concerns does not mean that the Court cannot examine the constitutionality of the EAA itself. It is fundamentally the duty, as I stated last Friday, of the federal courts to assess the constitutionality of congressional enactments as stated by the Supreme Court of the United States in the dim dark past in the case of Marbury versus Madison.

And I think that the fundamental analysis here is capsulized by this statement.

> "The political question doctrine may be applied by courts to limit" — and I underscore that — "limit the scope of judicial inquiry under certain circumstances, but the doctrine presupposes the constitutionality of the statute considered."

And we get some enlightenment from Baker v. Carr, which is probably the seminal political question case. And in particular, that case, 369 U.S. 186 at 210-211, stated in part, and I quote:

> "Much confusion results from the capacity of the political question label to obscure the need for case-by-case inquiry."

I am going to say parenthetically, I am going to allude to that case-by-case inquiry later on. Closing my parentheticals and continuing with the quotation:

> "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of the branch exceeds whatever authority has been committed is itself a delicate exercise in

constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."

Now, fortuitously for the defendant, the Supreme Court engaged in an analysis once again in this area in the recent case of Touby, T-o-u-b-y, versus the United States, and in part I would like to read from the Touby case where it states:

"The Constitution provides that all legislative powers herein granted shall be vested in a Congress of the United States." They then cite U.S. Constitution Article I, Section 1. "From this language, the Court has derived the nondelegation doctrine, that Congress may not constitutionally delegate its legislative power to another branch of government. The nondelegation doctrine is rooted in the principle of separation of powers that underlines" — "underlines," I should say, "our tripartite system of government."

They then cite the Mistretta case, which I can't help but add I wish they hadn't decided it that way. But be that as it may and moving on with my analysis.

"We have long recognized" — and this is the Supreme Court I should say. "We have long recognized that the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate branches. Thus, Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors. So long as Congress lays down by legislative act an intelligible principle. . ."

Again, parenthetically, this is an issue that has been addressed heretofore and will be addressed by me in the balance of this. Continuing with the quotation:

". . . to which the person or body authorized to act is directed to conform, such legislative action is not a forbidden delegation of legislative power."

As both of you know, this is not new law, and it merely sets forth the standard by which to evaluate the constitutionality of a delegation of power from the Legislative branch to the Executive

or Judicial branch. A delegation is proper if it lays down intelligible principles or minimal standards to which the branch delegated to is directed to conform.

Based upon this line of authority, the defendant argues, as the petitioner in Touby argued, that the purpose of requiring an intelligible principle is to permit a court to ascertain whether the will of Congress has been obeyed. I suppose you could argue that the purpose of laying down an intelligible principle is to give the coordinate branch the necessary directive to implement the dictates of Congress, and that gives me some pause, pause enough to say wait just a second. I want to talk to the law clerk.

(Brief Pause.)

THE COURT: Well, thanks for bearing with me. I am persuaded that the analysis that we have embarked upon here is correct, albeit this is a gnarly area, as the young people would say, gnarly, and I stress gnarly.

I suppose, to regain my train of thought, the argument would be, according to defendant, that there is no point in requiring an intelligible principle if there is no body to determine the principles were followed. Faced with this argument, the majority in Touby proceeded to uphold the statute at issue because it did allow for judicial review.

As Justice Marshall noted in his concurrence, it is implicit in the majority's reasoning that, quote, judicial review perfects a delegated-law making scheme by assuring that the exercise of such power remains within statutory bounds. Because of the severe impact of criminal laws on individual liberty, I believe that an opportunity to challenge a delegated lawmaker's compliance with congressional directives is a constitutional necessity when administrative standards are enforced by criminal law, closed quotes.

I want to say that is a very good expression of the position that is being tendered to this Court by the defendant, and I think I am persuaded to accept it, albeit, the majority did not say this, and an argument can be made that it must have been very clear to the

majority what Mr. Justice Marshall was saying the majority really meant, albeit the majority didn't say that that is what they really meant. So, I can see this argument.

There is a place in the opinion, because I went through this argument with the law clerk. There is a place in the opinion where you can argue that the majority did, indeed, contemplate that there would be a judicial review. Let me see if I can find it here.

(Brief Pause.)

THE COURT: I can't give you a page because this has — we just have it off the Westlaw, but page 6 of our Westlaw, the Supreme Court says in part:

> "We reject petitioners' argument. Although it", and refers to this section, "states that a temporary scheduling order is not subject to judicial review, another section of the Act plainly authorizes judicial review of a permanent scheduling order."

Which means that you could argue from that very definitely that the majority has recognized that there has to be judicial review, albeit they have not explicitly stated it as Marshall has, they nevertheless have inferentially stated it because they wouldn't have set forth there what they did.

Now, I have got to tell you that I think I would have been a bit more direct on this, but, most assuredly, I am not the last word on this. And I can only give you my input, and I can see both sides, which is the reason I say this and the reason I comment on some of these issues is that where I am going to come out is, I am going to find that this statute is unconstitutional on its face.

And I am going to say, most assuredly, that you need a circuit court or the Supreme Court to take the next step here because I am not in a position to do that. All I can do is give you my best shot, and you are going to have to take it from there.

Continuing with the analysis:

Therefore because the EAA does not provide for and in fact attempts to prohibit judicial review it is an unconstitutional delegation of the legislative power to the Executive.

Now, I want to say from a pragmatic standpoint that the ruling that I am making is the only possible ruling given the result if the government's position is carried to its logical extreme. And by that I mean this: Congress makes a delegation of legislative authority to the Department of Commerce and sets forth intelligible procedures for the Secretary to follow in exercising the delegated authority. And there is quite an intricate scheme set forth by the Congress where the Secretary must undertake certain prescribed reviews and engage other entities or people, to include the Department of Defense, in this review. So, it is quite thorough, and I grant you that. There is no doubt about it. However, the Secretary could then ignore Congress and act arbitrarily in determining what should be a crime. Necessarily, the individual who is indicted has no protection against the Secretary's arbitrary decision because there is no judicial review of the Secretary's action.

Congress could later, as we addressed at the time of our last hearing on Friday, reduce or change the Secretary's power, but it would be too late for the wrongly or improperly indicted individual. The fact that the Secretary's decision to create a crime could be the result of a political question and all of the myriad intricacies that may be involved in that analysis to include, but not limited to, foreign policy issue, defense issues, which may be beyond the ken of the court, or which may be something that shouldn't be made known to the court. Now, I find that rather hard to believe given the in camera filings that are made with the court with a great deal of frequency, and these can involve very arcane issues and very sensitive issues. So I am not satisfied that the court shouldn't be made privy. But be that as it may.

That political question issue needs to be addressed on a case-by-case basis, but it is distinct and discreet from a constitutionally infirm statute as has been drafted here. Therefore, my finding that

the statute is constitutionally infirm, I suppose, mandates a reviewable dismissal.

I am going to ask government counsel. Is that correct?

MR. HANNA: I believe so, your Honor.

THE COURT: All right. You know, as has been apparent, I would hope, I have labored with this between trying to try this other case and sundry other issues at some length. I am cautiously confident that this analysis that I have enunciated here this afternoon is the correct analysis, and I invite you to have it reviewed, as I am sure you will, by the Ninth Circuit. I have no pride of intellectual authorship here. But I think you are going to have real trouble with this unless this concept of intelligible principles is just between the Congress and the Executive to which the issue is referred, and I can't believe that it is so limited as that. Now you know it wouldn't be the first time I couldn't believe something and some circuit court found that I was incorrect. So, go to it and find out what the circuit says.

You know, the interesting thing is that at some time or other this was going to be addressed by the circuit. Were I to have found that the statute was constitutionally firm, which is not the terminology normally employed, but it certainly is the flip side of infirm, that would have necessitated a trial. And, most assuredly, had there been a conviction, there would have been a review by the Court of Appeals of this constitutionality issue. I did rule on that basis, but I have got to tell you that I think this ought to be reviewed up front before everybody goes through the whole exercise, if indeed it is found to be firm, as I have coined the term here. And I stress once again that wasn't the reason I am making this decision.

The other issue I want to address with government counsel is one that again is a practical one, and that is the issue that has been deferred by the Court in view of the urgings by respective counsel, and that centers about the delay in bringing the prosecution. You know, I am vaguely aware of the arguments that have been presented in part or in whole, as the case may be, to this court. I have not analyzed them as I have analyzed the constitutionality issue, but I can tell you this. A law clerk with a modicum

of smarts has looked at this, and he became somewhat agitated and said there are real problems for the government in the delay issue.

Now, I don't know that to be the case, and before you can prevail on a delay issue, as I said to the law clerk, Mr. Lundquist, you have got to cross a lot of hurdles. And I don't mind intermediate hurdles. I mean high hurdles. Okay?

And those hurdles, this law clerk may not have been sensitive to, but what I am telling both of you is this: I have not reviewed this. There is this specter, if you will, of some type of delay that would again invoke constitutional protections. I don't know whether it would be wise for me collaterally before I dismiss this case to address — dismiss and lose jurisdiction — to address this issue of delay so that you can package, if you will, the two main issues for the appellate court. I don't know whether they would take some umbrage with this two-for-one approach that I am suggesting, but it is a thought.

Give me your input, government.

MR. HANNA: Your Honor, I think that would be appropriate. At this point, we haven't focused on the speedy trial motion just because both sides have indicated that they were going to put that on hold for a bit and concentrate more on the constitutional law issue.

THE COURT: What is your position, Mr. Lundquist?

MR. LUNDQUIST: Your Honor, I have been thinking along your lines because we could end up having to do this thing twice. I would like to talk to the government about it, but I think we might give some serious thought to having the Court address that issue too, because I think it is — well, I could say some young law clerks here with a modicum of smarts agree with the —

THE COURT: When I say "modicum of smarts," I am really, I have to tell you, I am tweaking the law clerk.

MR. LUNDQUIST: Well, I am tweaking these folks, too, your Honor.

But we might talk to the government about that and see if we could make a proposal to the Court to see about getting that issue addressed also.

THE COURT: Well, I haven't dismissed yet. I want to make that clear, so that if somebody says you lost jurisdiction, I am not dismissing as yet.

MR. LUNDQUIST: Could we have, say, a ten-day hold on that while we think about it and talk to the government then, your Honor?

THE COURT: Give me a joint status report. You don't need ten days. I want a joint status report submitted by Monday next. I don't want to lose sight of this thing.

MR. LUNDQUIST: Fine.

THE COURT: You know, again, I am not passing any judgment on the viability of the issue as presented to me. I just know that a fellow with some ability has looked at this thing and says, "Hey, I see some problems." And I don't know if I will subscribe to his views or not.

MR. LUNDQUIST: I will talk to the government, and we will get back to the Court. How would you like us to do it, your Honor, on Monday?

THE COURT: Just file a status report, subscribed to by both of you if you can do so. If not, a telephonic authorization is okay for one signature. If you can't do that, then separate submissions. And I don't want any lengthy tomes. Just a couple of pages.

MR. LUNDQUIST: All right. We will get back to the government forthwith on that, your Honor.

THE COURT: Thank you very much.

MR. HANNA: Your Honor, I would like to be heard briefly on the constitutional issue, if I might. There are a couple of points I think that may not have been raised.

THE COURT: Well, since I haven't ruled finally, I will hear from you briefly, but I still have that civil rights case out there we have labored long and hard on.

MR. HANNA: I understand, your Honor.

THE COURT: They are in court waiting for me right now on instructions. I am looking forward to about two hours with them.

MR. HANNA: I understand, your Honor. I just want to make this point.

One of the things that I think that the defendant has argued is that there is the potential for the Secretary of Commerce and the entire Executive Branch essentially to go off on a tangent and just essentially disregard the will of Congress. One thing I would like to point out — I think it was pointed out in Mandel — is that whether something is properly on the CCL, Commodities Control List, is not an element of the case. The government has to prove only that it was on the CCL, and that the defendant acted knowingly.

So there is no unfairness if the government can establish, no matter how ridiculous, that the defendant knew that a particular item was on the CCL and was restricted that the defendant nevertheless violated the law, there is no inherent unfairness in prosecuting this defendant. It is not as if the government is creating a crime that no one knows about that the defendant is later charged with —

THE COURT: That isn't —

MR. HANNA: — and claiming for example, that rubber bands were restricted for sale to the Soviet Union. That's the first point.

Additionally, your Honor, I think that with respect to Touby, my reading of Touby, and I suppose Ms. Beaman set this out, is that the court there said that once you have intelligible principles, and I will quote, that these restrictions — talking about the principles — satisfy the constitutional requirements of the nondelegation doctrine.

Now, my reading of Touby is that is as far as the court need go. The court merely discusses the judicial review point because it was raised directly by the petitioner, and the court simply said to the petitioner, "No, you're wrong. There is judicial review with

respect to the statute. Congress has explicitly provided for judicial review and simply delayed it."

The fact, I think, that is compelling is that the majority did not mandate a bright line rule, and one would think that in the case of something that would have such a broad impact essentially declaring that all statutes that don't have judicial review built in are unconstitutional. One would think the majority would have said something about it or been somewhat more clear than some vague reference and leaving it up to Justice Marshall in the concurrence and simply point out in his view that judicial review is mandated.

THE COURT: Parenthetically, I said I recognized that argument. There is no doubt about it.

MR. HANNA: The other thing, your Honor, is that the ramifications of the defendant's view in this case are, I think, as I am sure the Court has given it considerable thought, are just huge.

In this case, based on that premise that there is a bright line rule that judicial review is mandated in connection with all delegations of legislative authority, this Court is called upon to overturn the EAA, an Act which traces its roots back to 1949. I suppose by implication that would delegitimize the hundreds of convictions that have come about under the EAA and the millions of dollars in fines and penalties that have come about under it, but would also by implication declare unconstitutional all the other acts which specifically exclude judicial review.

And I think it comes squarely in conflict with the political question doctrine in that this is an area under Mandel and under the line of cases that we have cited in our brief where the courts have simply said, "We don't want to get involved. We don't want to make those calls," the type of calls that the defendant wants the Court to make. And I think there are good reasons and not just that there is classified information involved, but I think fundamentally if the defendant's argument is adopted here, what it means in the extreme — and the defendant has put an extreme version of what happens if the government's position is taken. I think it is an extreme version of what the defendant's position

would entail if warranted as well. In the extreme, I think it would prohibit the government from controlling exports at all, and not just because classified material is at stake. Because when the government has to prosecute an individual, surely they would have to then, under the defendant's theory, put forward all the classified material and context of negotiations between the powers.

We also run into a situation where the district court out here, for example, may come to a conclusion that a particular item that is completely different from what, for example, a court in New York may come to.

There is no way that the government could then negotiate with COCOM and the allies and throughout the government come up with a list only to have that list later proved to be ineffective because various courts are coming to different conclusions as to the same item. It would be conceivable that this Court could say the polishers and coders at issue here are certainly on the list and should properly be on the list, and a court out in another jurisdiction could come to the opposite conclusion. That would essentially I think eviscerate the government's power to control exports at all.

MR. LUNDQUIST: In response, your Honor, the government just overstates the case. I mean that isn't the situation. As the Court has analyzed it, you look first of all to the delegation. So, that means you look, is it properly on the list, and that goes to the whole delegation analysis.

Going to Touby, the Skinner case cited by the majority says that the purpose of requiring an intelligible principle is to permit a court to ascertain whether the will of Congress has been obeyed. That is the whole analysis that goes to the separation of powers issue.

You are not going to get this case-by-case determination indifferent because here the whole separation of powers part stops that. It was improperly done. Congress can pass a statute which does not put in all these conditions it wants. It can delegate intelligible principle, or it can have a review of the firsst part of it

if it wants to just to see that the procedures were carried out. That isn't such an enormous task.

I think for the government to say that something — and the Court I think has correctly posited it the unconstitutionality issue. For the government to say that because it may have acted unconstitutionally for many years, it should have the right to do so going forward. This simply is not an appropriate analysis.

MR. HANNA: Your Honor, in response I think it is a mighty thin reed to pin a decision, to declare a statute unconstitutional based on a hypothetical given by the defendant that the entire Executive branch is essentially going to take leave of their senses and do something that is completely against the will of Congress. If that is the case, then we have got greater problems than the EAA.

And I think that and Touby is — if they are basing their argument on that hypothetical and on Touby, and Touby simply does not say specifically what the defendant wants it to say. And one would simply think, and I think the Court as we discussed before correctly pointed out, that something of this magnitude and having these implications, one would think that the majority would specifically state it.

THE COURT: Okay. I hear both your arguments. I'll put you on hold a moment. Wait for me.

(Brief Pause.)

THE COURT: Okay.

MR. HANNA: Yes, your Honor.

THE COURT: I am going to refer — I think that Skinner —

MR. LUNDQUIST: Can I make one brief point, your Honor?

I should have noted, as I did the other day, that Congress has already said in the legislative history here that the EAA has acted in an irrational and inconsistent manner. That is in the '85 —

THE COURT: That is not persuasive to me. I have got to sign off. I have got this other case.

Yakus, which we have been talking about from time to time here, which is a 1944 case, Y-a-k-u-s, 321 U.S. 414, states in part at pages 425-426:

> "Only if we could say there is an absence of standards for the guidance of the administrator's action so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed would we be justified in overriding its choice of means for affecting its declared purpose."

That is an exposition of judicial review, if not explicitly, first order of implicitly. Then, in Skinner v. America Pipeline Co. 420 U.S. 212 at 218, it is stated in part:

> "That requiring an intelligible principle is to permit a court to 'ascertain whether the will of Congress has been obeyed . . .' " because they are quoting Yakus, I think.

The fact of the matter is both of those cases definitely say it haven't just an intelligent, defined reference to the Executive that satisfies constitutional mustard. It has to take another step, and that is you have to involve the courts.

Now, I want to tell you, I don't need to protest here. Okay? But you are not talking with an activist court. I can assure you of that. Just the thought of saying that the statutory scheme is unconstitutional is a daunting thought. Okay? I don't gravitate to something like this readily. But I am telling you that the dictates of Yakus and Skinner as well as I think probably common sense, as well as what can be read into the Touby decision, that you have to come up with the conclusion that I have.

And, you know, I will follow it with a great deal of interest where you come out. You paint a very dire picture, as the government counsel. You may be correct. I don't think so. The question is whether there really is this retroactivity. I don't think using a retroactivity analysis that is employed in a setting such as this that in all likelihood you would have retroactivity, I don't think you would. But the enormity of the impact can't be the basis for the ruling, quite obviously.

So, I haven't ruled finally for stated purposes here. I have ruled provisionally because I want to also consider this other delay issue. So, maybe we ought to set this up — well, you will submit it on Monday, and we may — we will follow up on a telephone conference, if appropriate next week. Okay?

MR. LUNDQUIST: Thank you, your Honor.

MR. HANNA: Thank you, your Honor.

THE COURT: Thank you. Goodbye.

CERTIFICATE

I hereby certify that the foregoing is a true and correct transcript of the stenographically recorded proceedings in the above matter.

_____ _____

Loraine M. Daley, CSR, RPR
Official Reporter

Date

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

OGNIAN BOZAROV et als,

Defendant.

CRIM. No. 83-908 WDK

ORDER DISMISSING INDICTMENT

This matter having been fully heard and considered, the motion of defendant OGNIAN BOZAROV to dismiss the indictment herein on the grounds that the underlying statute violates the separation of powers doctrine embodied in the Constitution of the United States is granted, and

IT IS THEREFORE ORDERED that the indictment herein be dismissed.

IT IS FURTHER ORDERED that bail heretofore set be exonerated and that any cash deposit made be refunded to the surety or his assignee, and that the defendant BOZAROV be relieved of any conditions of release imposed.

Dated: August 29, 1991

WILLIAM D. KELLER

WILLIAM D. KELLER
UNITED STATES DISTRICT
JUDGE

No. 92-1071

In the Supreme Court of the United States

OCTOBER TERM, 1992

OGNIAN BOZAROV, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing the order of the district court dismissing the indictment in this case.

1. Petitioner was indicted by a grand jury sitting in the Central District of California. He was charged with conspiracy to violate the Export Administration Act of 1979 (EAA), 50 U.S.C. App. 2401, for his role in a scheme to transport to Bulgaria computer disc manufacturing equipment, commodities listed on the Commodity Control list as subject to export control. Pet. App. A4-A5.

The Export Administration Act provides for controls on exports of sensitive technology. It requires the Secretary of Commerce to establish and maintain the Commodity Control List and to issue licenses for the export

of listed goods and technologies. The Act delegates substantial authority to the Secretary and contains an elaborate set of criteria and procedures that govern the Secretary's imposition of export controls. Pet. App. A4.

On August 29, 1991, the district court dismissed the indictment on the ground that the Act violated the constitutional separation of powers doctrine by delegating to the Secretary of Commerce legislative authority to control exports and prohibiting judicial review of the Secretary's decisions. Pet. App. A20-A27, A32-A35.

The court of appeals reversed. Pet. App. A1-A17. The court ruled that the Act's preclusion of judicial review does not violate the nondelegation doctrine or petitioner's right to due process. The court said that the legislation was valid because Congress laid down an "intelligible principle" to channel the discretion of the Executive. The court explained that this Court's decisions on preclusion of judicial review, "the language of the Administrative Procedure Act, and the fact that the EAA involves foreign policy issues support our conclusion that the EAA's preclusion of judicial review is constitutional." Pet. App. A14-A15.

2. Petitioner contends (Pet. 3-10) that the Export Administration Act violates the separation of powers doctrine because Congress may not make a broad delegation of authority to the Executive that precludes judicial review of the delegated functions. Whatever the merits of petitioner's contentions, they are not ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he

may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.* It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

JANUARY 1993

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.